EXHIBIT H

3/21/95 ORAL Argument Whitmer questioning CCT's Mr. Shipp

A No. It was after some frustration and not making any headway or progress with AT&T relative to a direct deal that we had proposed in good faith that we made that decision. I so notified AT&T.

Q You couldn't reach an agreement for a contract tariff with AT&T, isn't that correct?

A I think that's certainly true.

Q As a result of your inability to reach a contract tariff with AT&T, that is when you devised the transaction to send only part of the service of the Winback plans to AT&T, isn't that correct?

A No, six.

Q When did you do that?

A I did it as a mechanism to prolong the life of the plans for the absolute desire for a working relationship with AT&T. And recognizing that we had a responsibility and a commitment under the tariff, we structured our arrangement with PSE so that we could move the traffic back, when appropriate to meet the commitments.

Q You understood, did *you* not -- at least you thought you understood -- if you transferred only the service but not the plans, PSE would not have any liability for shortfall termination? Correct?

A With respect to --

Q Plans.

Whitman questioning of Mr. Inga 3/21/95

A That's right.

Q You've been paid promotional credits in the form of air line tickets; isn't that correct?

A Yes.

Q Is it fair to say many thousands of dollars in airline tickets in promotional credits have been given to the corporations who own those plans?

A I have not made a list of the dollars that have been accumulating on airline tickets, That is a very nothing part of our business. 516 offers million dollars in promo money, also.

So far as the passes, what the CSTP would be, the point is moot.

Q Whether it is moot or not, Mr. Inga, the fact is you have received promotional credits all along in holding the CSTP plans?

A If I was given 516, I would have --

THE COURT: Mr. Inga, we'll be here to midnight. Listen to his question. How ever stupid you may think the question is, answer it. Don't make a speech.

A Okay.

Q You've been paid promotional credits on the CSTP XI plans, correct?

A My companies have been, yes.

Q In point of fact when you started these companies, you

moved traffic from One Stop Financial on to those plans; isn't that correct?

A You Used a Transfer of Service Agreement to move account locations. Not plans.

Q You created those CSTP II plans, created the companies to take the service under those CSTP If plans in part for the opportunity to gain those promotional credits, is that correct?

A Mr. Fitzpatrick directed my to do that. Yes.

Q Mr. Fitzpatrick directed you to do it, but you, in fact, did it; isn't that correct?

A Because they wouldn't give me a contract tariff.

Q Mr. Inga, you were told,by Mr. Fitzpatrick that if you formed companies, you could get a CSTP II plan at promotional credits, correct?

A If I formed four companies, I could have taken out four 4516 tariffs because it was only for 20 million a year.

Q Mr. Inga, my question is a simple one. Please try to listen to my question.

You formed the CSTP II plans for the purpose of getting the promotional credits on the CSTP II plans, correct?

A No. I formed them to obtain the promotional moneys. Is that what I really wanted to do? That was my only

3/21/95 Judge Politan questioning Inga

A No. Because the Transfer of Service Agreement says that the former customer is still jointly and severally liable for the remaining commitment, even the unexpired portion, the unexpired portion of the minimum applicable term period.

In fact, you in your letter to me or to Mr. Helein on December 22nd, 1993 states exactly that point.

Q Mr. Inga --

BY THE COURT:

Q Do you understand --

THE COURT: Let me try.

MR. WHITMER: Thank you, your Honor.

BY THE COURT:

Q When you were going to make the transfer to CCI, did you understand that CCI was going to assume that obligation and that you were going to remain jointly and severally liable for it?

A We would both be liable, yes.

THE COURT: Very good. We'll take a short recess.

(Recess.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., AND WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC., 800 DISCOUNTS, INC., AND PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., Plaintiffs, v. AT&T CORP., Defendant.	:	HON. NICHOLAS H. POLITAN, U.S.D.J. CIVIL ACTION NO. 95-908 (NHP)

AT&T'S BRIEF IN CONNECTION WITH THE REHEARING ON PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

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Whitmer 1995 brief to District Court

II. IF THE COURT WERE TO ISSUE AN INJUNCTION, THE INJUNCTION BOND SHOULD BE $15,000,000

A party whose application for a preliminary injunction is granted may be required to post security in order to pay "such costs and damages as may be incurred or suffered by any party who is wrongfully enjoined or restrained." *Fed. R. Civ. P.* 65(c). The posting of a bond is required when the potential for monetary loss is substantial. *System Operations v. Scientific Games Dev. Corp.*, 555 F.2d 1131 (3d Cir. 1977). This is just such a case.

The harm resulting from an order for AT&T to execute the CCI-PSE transfer is two-fold. First, a transfer of substantially all of the locations on the Plans would have the result of increasing the potential shortfall to AT&T. Second the possibility that CCI will be unable to satisfy its tariffed obligations because it is transferring its principal assets --- the end user accounts --- to PSE would leave CCI with no apparent revenue stream to meet its existing commitments and no apparent assets from which to satisfy potential shortfall liability. These charges are all tariffed obligations, for which CCI, not PSE (which would have the revenue stream to satisfy such charges), would be obligated.

plaintiffs' efforts to carry out this plan by enforcing rights contained in filed tariffs.

In response, plaintiffs have tried from the outset of this action to convince this Court that their tariffed shortfall and termination liabilities to AT&T are illusory, thereby hoping to persuade the Court to order AT&T to permit the two-step transfer without either requiring CCI to furnish a security deposit or requiring PSE to accept the plans (and all of their liabilities) in addition to the traffic.[2] Plaintiffs' own pre-litigation agreements, however, refute their arguments and justify AT&T's reliance on its tariffed rights.

Specifically, the agreement between Winback and CCI itself attempts to apportion shortfall and termination liability. In no less than three paragraphs of their eight paragraph agreement (Exh. D-3), Winback and CCI deal with the allocation of risk for

---

[2]Plaintiffs have made this "illusory risk" contention often, both in argument and testimony:

"[n]o shortfalls exist under the plans and the possibility of future shortfalls is non-existent" (Plaintiffs' Initial Brief at 13);

"[m]oreover, AT&T totally ignores the fact that there will be no shortfall and termination liability for the Winback plans." (Second. Certification of Larry G. Shipp, ¶ 44.);

". . . AT&T's expectant penalties for a shortfall and termination chargee are but a farce." (Second Certification of Alfonse G. Inga at 6.)

And during the hearing, Mr. Inga said that "there are never shortfall termination possibilities." (Transcript, p. 112, l. 21-22.)

Whitmer questioning Mr. Inga 3/21/95 ORAL Argument Transcript

commitments, isn't that true?

A Not at all.

Q Could you look at the Williams affidavit, the Williams certification that was filed in this action?

A Yes, I did look at it. The Williams certification bases their certification on the original commitments of the plan which those commitments have been ameliorated substantially due to time.

My commitments are much less now. In fact, I'm graded among the very top of the aggregators in the United States of meeting my commitment based upon AT&T's information.

Q Mr. Inga, you know, do you not, that if the service, except for the home account -- or Mr. Yeskoo called it the "lead account" -- is transferred to PSE, the shortfall and termination liabilities remain with Winback & Conserve, isn't that correct?

A Are we referring to movement of BTNs now, or the plan.

Q BTN is business telephone number, correct?

A Yes. The locations. The individual accounts. Those are the individual locations.

Q I'm talking about just the BTN. Not all the obligation.

A Would I still be liable?

Q Yes.

3/21/95 ORAL

Winback and conserve when they got all these credits from AT&T?

MR. WHITMER: First of all, your Honor, Winback & Conserve voluntarily subscribed to all of these plans and took on the obligations and received promotional credits from AT&T to do that. When it did that, Winback & Conserve had existing traffic -- not as Winback & Conserve, but Mr. Inga had other traffic which he was able to transfer over to these new plans.

He started some of those plans not from, shall we say, ground zero, but was able to move traffic that he had on other plans with AT&T.

THE COURT: What other plans did Winback & Conserve have that you ever requested a security deposit?

MR. WHITMER: The answer to that question is when Winback & Conserve took these plans, we had a proven history from Mr. Inga's companies. When Winback & Conserve started --

THE COURT: I'll get back to the genesis.

MR. WHITMER: Perhaps. Perhaps we should have asked for a security deposit, your Honor. Perhaps we have that right.

I'm tired of having laughter in the background, your Honor.

THE COURT: Gentlemen --

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., a Florida corporation, AND WINBACK & CONSERVE PROGRAM, INC., a New Jersey corporation, AND PUBLIC SERVICE ENTERPRISES OF PA, INC., a Pennsylvania corporation Plaintiffs, v. AT&T CORP., a New York corporation, Defendant.	AFFIDAVIT OF PATRICK BELLO IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AN ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

Patrick Bello, being duly sworn, deposes and says:

1. I am the Vice-President of Public Service Enterprises of Pa., Inc. ("PSE"). I make this affidavit in further support of Plaintiffs' Application for an Order to Show Cause With Temporary Restraints.

Background – PSE's Resale Business

2. PSE is engaged in the telecommunications resale business, including the resale of outbound services, 800 services, and combined outbound and 800 services offerings.

3. PSE resells AT&T's services to small businesses. PSE obtains service from AT&T pursuant to AT&T's tariffs for outbound services. In particular, PSE has obtained service pursuant to a contract tariff with AT&T that combines 800 services and outbound calling services, which PSE resells to small businesses. PSE's contract tariff is AT&T's Contract Tariff F.C.C. No. 516 ("Contract Tariff 516"). PSE is a long time customer of AT&T, and has established and maintained a record of financial responsibility with AT&T for several years. PSE' monthly AT&T usage is several million dollars per month.

4. Because of the discounts PSE enjoys under Contract Tariff No. 516 and other AT&T offerings, PSE is able to resell its Contract Tariff No. 516 services to aggregators, such as CCI and Winback, and/or other resale carriers, at better rates than those that may be available directly from AT&T. Aggregators therefore enter into agreements with PSE and transfer their traffic to PSE in order to obtain higher discounts.

5. As AT&T's customer of record under Contract Tariff No. 516, PSE is also directly liable to AT&T for the charges incurred for the outbound and 800 usage of AT&T services by PSE's customers, including the traffic transferred to CCI by Winback which would have been included in the traffic CCI seeks to transfer to PSE.

6. AT&T directly provides the network facilities and services for the outbound and 800 services PSE aggregates to its end users. AT&T also bills and collects the charges for aggregated outbound and inbound services from PSE's end users and remits to PSE a portion of the charges collected according to the terms negotiated by PSE and AT&T.

7. On January 13, 1995, CCI and PSE jointly executed and submitted written orders to AT&T to transfer 800 traffic under numerous plans to PSE, as customer of record under AT&T's Contract Tariff 516. These plans included Plans Nos. 1351, 1583, 2430, 2828, 2829, 3124, 3468, 3524 and 3663, true copies of which are attached hereto as Exhibit A (hereinafter collectively the "Plans"). The purpose of this traffic transfer order was to obtain service under the more favorable terms of the PSE Contract Tariff 516 than existed under the tariff terms then covering the Plans themselves.

8. As a result of the transfer of CCI/Winback's traffic to PSE's Contract Tariff 516, PSE receives significant benefits by increasing its volume of traffic serviced under Contract Tariff 516. This opportunity is unique and fleeting. There are limited opportunities for PSE to acquire comparable traffic volumes for inclusion in its Contract Tariff 516 other than the one available from CCI's transfer of the traffic as it has proposed.

9. The monetary value of PSE's loss if AT&T blocks PSE's transaction with CCI is not readily calculable, as it includes significant harm to PSE's goodwill and reputation with respect to its independent contractor agents and the public. At a minimum, PSE will lose the revenues from each minute of traffic that AT&T provides to CCI at rates higher than those available under Contract Tariff 516.

Patrick A. Bello
Vice-President
Public Service Enterprises of Pa., Inc.

Subscribed and sworn to before me
this 24th day of February, 1995

Notary Public

NOTARIAL SEAL
HELEN M. MURRAY, Notary Public
Whitpain Twp., Montgomery Co., PA
My Commission Expires Jan. 27, 1997

EXHIBIT I

A No. In fact, in the January 31st transmittal you will see in the bottom paragraph it says "This order is solely to move the locations associated with these plans and not intended in any way to discontinue the plans."
The reason why that was there was because we didn't want to invoke the shortfall penalty, having the plan collapse, without our ability to meet the annual commitments. So we didn't want to prematurely cancel. It had to survive.
Q Approximately how many times have you used this form to transfer end user accounts as opposed to plans prior to this transaction?
A Hundreds.
Q **Had AT&T ever come to you and said, by the way, Mr. Shipp, we want you to know you're also transferring the shortfall and termination liabilities with the lead account when you transfer an end user account?**
A Never.

January 23, 1996 Oral Argument Transcript:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO. 95-908

COMBINED COMPANIES, INC., a Florida Corporation,

And

WINBACK & CONSERVE PROGRAM, INC., and its related entities, ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC., 800 DISCOUNTS, INC., a Pennsylvania corporation,

Plaintiffs,

-vs.-

AT&T CORP., a New York Corporation.

Defendant.

: TRANSCRIPT OF PROCEEDINGS

Newark, New Jersey
January 23, 1996

BEFORE:

THE HONORABLE NICHOLAS H. POLITAN,
UNITED STATES DISTRICT JUDGE

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken steno graphically in the above-entitled proceedings.

Stanley B. Rizman
Official Court Reporter

Appearances:
FABRICANT & YESKOO, ESQS.,
BY: THOMAS D. TAMLYN, ESQ.,
For Combined Companies, Inc.
PODVEY, SACHS, MEANOR, CATENACCI,
HILDNER & COCOZIELLO, ESQS.,
BY: H.CURTIS MEANOR, ESQ., and
HELEIN & WAYSDORF,ESQS.,
BY: CHARLES HELEIN, ESQ.,
For Winback & Conserve.

PITNEY, HARDIN, KIPP & SZUCH, ESQS.,
BY: FREDERICK L. WHITMER, ESQ.,
RICHARD H. BROWN, III, ESQ.
And
AT&T CORP.
BY: EDWARD R. BARILLARI, ESQ.,
For AT&T.
.

STANLEY B. RIZMAN, CSR, OFFICIAL COURT REPORTER, NEWARK, N.J.

The FCC should be aware when reading this oral argument that the date is now months after the prospective implementation of Tr. 9229 in November of 1995. AT&T replaced Tr. 8179 with Tr 9229 in June of 1995, and---as the AT&T Meade certification stated—would be on a prospective basis. However the FCC will see that Mr. Whitmer, Mr. Brown and Mr. Barillari lie to the District Court that 9229 is still pending

an appropriate practice that AT&T had undertaken and whether it was appropriate under the tariff, that that was a decision which reflected the Court's judgment with respect to the implementation of the Federal Communications Act policy. That I think was correct.

Instead of bringing this reconsideration motion, which I think doesn't accomplishes anything, if the plaintiffs had gone to the Federal Communications Commission and filed -- Mr. Helein is a practitioner there on a regular basis. I'm not giving him the revealed wisdom that I turned up on gold tablets that I found on the side of a mountain in Utah, your Honor. I'm talking about something well-known to a practitioner.

If he filed the Complaint, either informal or formal Complaint, with the Commission in July to tee up this issue precisely as he wanted it teed up in the forum this Court had concluded was the appropriate forum in which it would be decided, they would be much further down the road than they claim to be today.

So that from the threshold of this argument; namely, whether or not primary jurisdiction should be here, the answer is it should not. It should, in fact, be the FCC that decides this issue. If, in fact, it is this Court's --

THE COURT: Tell me about what happened at the

FCC.

MR. WHITMER: I think Mr. Meanor's affidavits have told you that in some respects. I will give it to you in --

THE COURT: Why was it necessary and -- why was it necessary to take the rather simple, uncomplicated issue that was involved in both this case and in the filing with the FCC, withdraw it after it had been there a couple of months, and replace it with 62 or 72 or 82 pages of -- give that to me -- where -- I would like to know where it is in that submission. In what page of that submission is this issue dealt with and why?

That is my problem. I'll be perfectly honest with you.

MR. WHITMER: Let me respond to that this way, your Honor.

THE COURT: Here it is. It's an inch thick.

MR. WHITMER: Yes, it is.

THE COURT: The other one was one page.

MR. WHITMER: Your Honor, let's deal with it in two ways.

The first way is that the Federal Communications Commission has as its charter a very much broader command in terms of determining and directing Federal Communications Act policy.

THE COURT: Absolutely right.

MR. WHITMER: And although I'm not a Communications Act practitioner in the Communications Commission and I do riot purport -- I do not purport to tell *you* from personal experience what happens in the Commission. I do know that the processes in the Commission in terms of tariff dealings are less formal than they are adjudicatory -- than the adjudicatory processes are.

I'm sure this is not the first time in the history of AT&T's submission to the Commission that something has been submitted to the Commission seeking to solve Problem X and the Commission looks at it and says: Well, yes, but you've got Prbblem Y and Problem Z or that: the solution to Problem X creates problems A, B and C, so on.

You have an evolutionary process.

Now --

THE COURT: This was not an evolution. This was an explosion. I mean, "evolved" means like one to three, three to seven. This is from a one-page submission to 60 some-odd pages.

I would appreciate your telling me on which one of these pages, which I think are unnumbered, the issue that is involved in this case is.

MR. WHITMER: I think I've given you the answer to that already.

THE COURT: Where is it?

MR. WHITMER: That is the way -- the direction that AT&T --

THE COURT: No. I want an answer to that specific question.

MR. WHITMER: I've answered that question.

THE COURT: If you answered it, I haven't heard the answer or I don't understand the answer. Okay. Where was it in here?

MR. WHITMER: Your Honor, there is not a single page in that submission that cues up precisely the issue that is here. That we've said. I say it now. I'm not ducking the question. But here is

THE COURT: What was the other submission? Let's talk about the other submission. Get me the other submission.

MR. WHITMER: The other submission directed itself specifically to this case.

THE COURT: Yes.

MR. WHITMER: The Commission, in discussions with AT&T, broadened the issue. AT&T took the tack -- took the tack to try to address the question differently.

But let me respond to a broader question of the

Court. A broader concern.

If the Commission, your Honor -- if the Commission --

THE COURT: Are you telling me the Commission couldn't answer that question? Is that what you're saying to me, the Commission could not answer that question?

MR. WHITMER: No, your Honor. Of course not.

THE COURT: What are you saying? The question was there. I mean, if somebody brings a question before me -- put aside for the moment that I am a judge, because I'm perhaps more formal than the FCC.

MR. WHITMER: That is a big "perhaps," your Honor. That is a very big "perhaps."

THE COURT: But if you come into chambers and I don't have my robe on and you give me Issue A, I don't tell you to give me the invention of the time machine. I say I want to talk about Issue A.

You very well knew -- your client very well knew -- let me just finish. Everybody very well knew where I was coming from in my opinion of May 19th about primary jurisdiction.

There is no question in my mind, at least, to the English that I used, where I was coming from.

I suspect most people, given a fair reading to this very short document that I produced here, some 25

pages of opinion, knew what it was all about because there was only one section of it, about two or three pages, that dealt with primary jurisdiction.

I felt *very* comfortable with the fact that, A, your client had submitted the issue to the FCC, that the FCC was going to apply its expertise to the issue and that whatever that resolution waa would come back to me and then we'd determine what to mold, if anything, here.

MR. WHITMER: That is still true, your Honor.

THE COURT: When will it happen?

MR. WHITMER: That is still true. If the tariff submission that is before you which you described as the explosion is, in fact, put into place, your Honor, that will -- by its being permitted to go into effect, in effect, your Honor is saying that AT&T's position with respect to the transfer, that we refuse to give here, was also correct.

Why is that?

THE COURT: *Why* is that?

MR. WHITMER: Why is that?

THE COURT: Why is that?

MR. WHITMER: It's easier for me to ask the question and then answer it.

THE COURT: You ask the question and answer it.

MR. WHITMER: I know that is the question the

It is already in place

11/23/96

MR. WHITMER: I'll let you talk to my first wife and ask if it is necessary to assume that obligation if I wore the robes.

THE COURT: I wouldn't have to do it.

MR. WHITMER: This is a discussion that may be useful to pursue, but not on the record.

The answer to why is that -- is what AT&T -- what AT&T is doing with respect to the broader submission to the Commission is, in effect, setting up a different tariff set of procedures which will address the question and problem that these transactions, as are put into issue in this case, have raised.

Another if

If the Commission permits AT&T to go forward with this tariff submission, as I think they will, that in and of itself means that the practices that are set forth in the expanded -- in the expanded submission are reasonable practices or lawful practices, as the Commission has worked with them and has permitted them to go into effect.

That means, your Honor -- I think by analogy perhaps more so than than absolutely as a matter of law -- but I think the Court can take from that reaction of the Communication Commission to the new submission that AT&T was appropriate -- was acting appropriately under the Communications Act when it refused to recognize the fractionalized transfer.

That is the reason why --

THE COURT: They don't want to answer -- that submission will not answer it retrospectively, but merely prospectively.

MR. WHITMER: Your Honor, let me do it a different way.

THE COURT: Sure.

MR. WHITMER: The Act hasn't changed.

THE COURT: Which Act?

MR. WHITMER: The Federal Communications Act.

THE COURT: You refer to this act that goes on once a month in front of me?

MR. WHITMER: It has been a long time since it has gone on,

THE COURT: Only because it was on the road for a little while in Pennsylvania.

MR. WHITMER: I enjoyed Philadelphia, your Honor. I especially enjoyed the result.

THE COURT: I understand you had a very major victory. Very good.

Was it in a case similar --

MR. WHITMER: Justice triumphs, your Honor.

THE COURT: Justice triumphs regardless of who wins.

MR. WHITMER: Correct.

THE COURT: That doesn't add anything to the luster.

MR. WHITMER: That is correct.

THE COURT: Victory is the victor.

MR. WHITMER: They said AT&T monopolized, restrained trade, engaged in unreasonable practices and a variety of such similar claims. And the jury returned a verdict in AT&T's favor in all respects and returned a verdict on the counterclaim of $660,000 for services rendered but not paid for.

That was the verdict after three hours of deliberation following a three-month trial.

THE COURT: Very good.

MR. WHITMER: Your Honor, what will -- what has resulted in what is before you is -- what you called the "exploded tariff submission" is, in fact, a document which does not on its face and pursuant to its own terms adjudicate the controversy between AT&T and these plaintiffs. That's true. But that's really not important. It's not.

THE COURT: It is not important to who?

MR. WHITMER: It is not important to you. It is not important to me. It is not important to these plaintiffs. It is not important because the fact that the Commission would permit AT&T to put into place the tariff

submission which you have in your hands now would, by the act of doing that, mean that AT&T was appropriate and proper in dealing with the problem. That would mean that it would nut have been an unreasonable practice. It was not an unreasonable practice.

THE COURT: That I got to do by inference after they agreed to permit you to put into focus this 60-page thing.

I always thought primary jurisdiction -- excuse me for saying so. I always thought primary jurisdiction meant if there was a matter that had to be adjudicated, adjudicated, adjudicated before a court, that if there was another body which was charged with expertise in that area, that it was appropriate to cede the power of this Court to that tribunal to get their expertise on the issue which had to be adjudicated.

MR. WHITMER: Your Honor --

THE COURT: Wait a minute.

MR. WHITMER: You'll get that.

THE COURT: You say I'll get that. I'm not sure I'm going to get anything. I don't know what you're going to do here.

Let me ask you this question. Where is this thing now? (Referring to brief.) What phase of the proceeding?

MR. WHITMER: It is pending, as I understand.

THE COURT: Pending. I have 324 cases pending here. Some are ripe and will be determined very promptly, like the jury trial I'm doing today. Others may not be reached for another year and a half for two years. Where does this end?

I recognize you have been tabbed as the expert in this area. We'll get to you. (Remark addressed to Mr. Helein.)

MR. WHITMER: The answer to your question I don't think can be given with the kind of precision that you want.

THE COURT: Can you give me something with the precision of an action as distinguished from a scalpel? You like that, don't you?.

MR. WHITMER: I do like that, your Honor.

THE COURT: Write it down so you use it the next time you have to argue.

MR. WHITMER: I'll have to remember it was you who said it so I can either quote you --

THE COURT: You can steal from me all you want. Everything but my wife you can have.

MR. WHITMER: Actually, I learned from an expert witness of mine many years ago that precision sometimes only mimics accuracy. So that being precise about

something is not necessarily being accurate. I can't be precise. I'm going to try to be accurate.

The Commission does not have a rigid timetable with respect to deciding such things, to be fair about this.

On the other hand -- and I come back to something I've said earlier. On the other hand, if these plaintiffs filed a Complaint in the Commission to tee up this issue under the doctrine of primary jurisdiction, as the Court ruled earlier, that sets in motion time periods to permit the issue to come to a head in the Commission. This Court -- this Court ruled sensibly.

THE COURT: In other words, if they tee it up tomorrow morning, when will they get an adjudication?

MR. WHITMER: I don't know, your Honor. That is a very honest answer. I don't know.

THE COURT: We lost about -- since May, let's say -- since March or April or May, we lost almost a year.

MR. WHITMER: But, your Honor, forgive me for saying this. That is really not my fault. It is not my fault for two reasons. Because the day after you decided -- was it May 19?

THE COURT: May 19 was the opinion date.

MR. WHITMER: I don't know what day of the week that was. But -- whatever day.

incomplete record, an interlocutory record.

Since May 19th, 1995, your Honor, and even before that. We've taken no discovery. We've taken no steps to advance this case because, frankly, I expected the FCC's decision on the tariff submission that came out to be beneficial to this Court in giving direction.

There is one thing I forget to say earlier which I may have said by indirection. I will say it more directly. That is the Court previously suggested that in primary jurisdiction you would refer the question to be referred -- can you do X and the expert agency comes back and says yes or no.

That is not the only purpose of primary jurisdiction. Because in addition to decision, I think guidance is another reason for primary jurisdiction.

The Commission's resolution of the tariff submissions that AT&T has made, including the one that is before your Honor in what you call the exploded version, the number of which for some reason I can't keep in my head, but that tariff submission, your Honor, once it goes into effect, even if it doesn't as a matter of law have retrospective application. And even if it doesn't as a matter of law decide this case and even if it, as a matter of law, doesn't require you to make a finding in a certain way in this case, it will, as a matter of law and as a

matter of common sense and as a matter of legal logic, give you guidance.

THE COURT: What guidance would it give me?

MR. WHITMER: Well, if the Commission permits the tariff submission to go into effect --

THE COURT: This one?

MR. WHITMER: Yes, sir.

THE COURT: The fat one. ← TR 9229

MR. WHITMER: That will tell you, I think -- that will tell *you* that AT&T can appropriately forbid people from fractionalizing their service.

We used that term before. That you can't separate the plan from the service.

THE COURT: Where in here would that say that?

MR. WHITMER: Well, your Honor --

THE COURT: Where?

I'm just a poor country judge, okay? I don't go to Washington. I don't go to the FCC. But I've been trained to read and write the English language and no other. You're saying --

MR. WHITMER: I doubt that.

THE COURT: The FCC permits this to go into existence. This is going to give me guidance. Well, my only question is: Whence in this Bible is the guidance?

That is all I want to know. Where is it?

MR. WHITMER: If you look in Mr. Meade's second supplemental affidavit, your Honor, I think he gives you direction.

THE COURT: Gives me a direction.

Let's get Mr. Meade's supplemental certification.

MR. WHITMER: The second --

THE COURT: The second supplemental certification. Give me that. Do I have it here?

MR. WHITMER: I have it.

THE COURT: Mr. Meade's certification dated -- I think I have it -- March 6th, or is there one after that?

MR. WHITMER: It is November 28, 1995.

THE COURT: November 28. We'll get that. Be patient with us.

MR. WHITMER: Specifically.

THE COURT: Let me get it first.

MR. WHITMER: I have it here. You can have my copy.

THE COURT: This is the fat supplemental.

Could I borrow a copy of yours and it will make it faster?

MR. WHITMER: I'll hand it up to your Honor.

THE COURT: Sure.

(Document handed to the Court.)

MR. WHITMER: If you look at paragraph 15 --

THE COURT: Paragraph 15.

MR. WHITMER: You can look at everything, obviously.

THE COURT: You say look at paragraph 15.

"On October 26, 1995, AT&T Corp. filed Tariff Transmittal No. 9229 with the FCC. Transmittal No. 9229 addresses the problem implicated in the CCI-PSE transfer --- the segregation of assets (locations) from liabilities (plan commitments) --- in the following manner. (Relevant pages of Transmittal 9229 are attached hereto as Exhibit E.) Section 2.5.8.B (Shortfall Deposits) gives AT&T the right to demand a deposit to cover shortfall charges in the event: a) the term commitment is greater than one year; b) the customer is asked to remove locations (by transfer or otherwise) such that the remaining locations would generate charges less than 80 percent of the revenue commitment; and c) the customer's net assets are insufficient to secure against the risk of shortfall or the customer's financial responsibility is not a matter of record. Section 2.1.8 (Transfer of Service) of Transmittal No. 9229 specifies that AT&T has the right to reject the requested transfer if either party fails to pay a required deposit."

That's it.

MR. WHITMER: Yes, sir. Irrespective whether

Whitmer knew all along

that is prospective -- may I have it back?

THE COURT: Sure.

(Document handed to Mr. Whitmer.)

THE COURT: We've got it, also. In fact, we even had it marked in pen. Just to show you all the tricks of the Court.

All right. Be that as it may, let me hear from Mr. Helein for a minute about all of this.

What is your commentary, Mr. Helein? I've got to get on with a jury trial.

MR. HELEIN: It will be brief, your Honor.

THE COURT: I have all the papers. I have masses of papers,

Go ahead.

MR. HELEIN: Thank you, your Honor.

First of all, I would just simply like to point out that Mr. Meade made one, probably, truthful statement in the certification.

THE COURT: Let's not start with that, please. Just say -- I don't want to get into the throwing issue. If I want to have dirt, I'll put people on the stand. I'll charge people who lie -- send them over to the U.S. Attorney's office to be prosecuted. We're not in that stage.

MR. HELEIN: Mr. Whitmer said 9229 addresses the

issue. He read from that. Mr. Meade in the following paragraph of the second supplemental certification, paragraph 16, admits the transfer of 9229 will not apply to the Court as referred to the FCC back in May.

The fact is that --

THE COURT: Then the matter is not before the FCC.

MR. HELEIN: No, it is not, by Mr. Meade's own certification.

THE COURT: Why shouldn't you bring it to the FCC?

MR. HELEIN: First of all, your Honor, we have brought the issue to the FCC both in the petitions to reject 8179, which AT&T withdrew -- that was where the fractionalization issue was addressed specifically.

THE COURT: A complaint and a counterclaim, if I might use my vernacular.

MR. HELEIN: Because it is important -- Let me just address it this way. In a tariff process you file a petition to reject or suspend. That is what they're called.

The tariff carrier files a response to that. Then, if the Commission allows the tariff to go into effect despite the objections, then you file the formal complaint, which is more like what we would do here in

EXHIBIT J

Working Copy

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., a Florida corporation, AND WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC., 800 DISCOUNTS, INC. and New Jersey corporations, AND PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., a Pennsylvania corporation, Plaintiffs, v. AT&T CORP., a New York corporation, Defendant.	CIVIL ACTION NO. 95-908 (NHP)

AT&T'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT ON THE GROUNDS OF PRIMARY JURISDICTION

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PRELIMINARY STATEMENT AND INTRODUCTION TO ARGUMENT

AT&T Corp. ("AT&T") submits this Brief in opposition to plaintiffs' request for preliminary mandatory, injunctive relief and in further support of AT&T's motion to dismiss this action on the grounds of the FCC's primary jurisdiction.

What is at issue on this preliminary injunction application is truly simple and straightforward -- despite plaintiffs' efforts to confuse and complicate the issue. This case is about AT&T's right to obtain appropriate security for the provision of service as a result of transactions that put AT&T at financial risk and about plaintiffs' efforts to evade the security arrangements authorized by tariff. Plaintiffs' extraordinary application for preliminary, mandatory relief should be denied because that relief will radically alter, not preserve, the status quo and because plaintiffs have not satisfied the exacting standards to obtain the extraordinary relief they seek and because the issues plaintiffs ask this Court to decide are within the primary jurisdiction of the FCC.

Plaintiffs' recent arguments are also revealing of plaintiffs' true desires. After arguing -- unsuccessfully -- in their Supplementary Brief that this action should be dismissed on primary jurisdiction grounds, plaintiffs now show what they really want from this action: the terms of Contract Tariff 516 as preliminary injunctive relief even though the time to subscribe to that tariff has long been closed. Even putting aside that this request for

relief has not been plead, plaintiffs' new request for preliminary relief should be denied because: 1) plaintiffs have not demonstrated that the Inga companies and CCI ever requested service under Contract Tariff 516 during the period provided in the tariff for qualification; 2) plaintiffs have not shown that CCI qualifies for service under Contract Tariff 516; and 3) this request rests on the erroneous premise that a party has a *right* to receive the benefits of a Contract Tariff that will assist its ability to compete.[1]

AT&T's recent experience with resellers has taught AT&T a hard lesson about extending credit to resellers. AT&T has accumulated over a $100,000,000 in overdue unpaid bills from resellers in the last few years. That experience has brought home to AT&T in harsh reality the need for security deposits, especially from customers who are prepared to promise large commitments to obtain discounted service but who may not be able to meet those commitments. There is, thus, no doubt that AT&T is at substantial financial risk on the Inga plans and, if the transfers the plaintiffs seek are ordered, AT&T faces the immediate, genuine potential of substantial, unsecured losses.[2]

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[1]As we demonstrate later, the issue of the reasonableness of the 90 day subscription window in Contract Tariff 516 (about which plaintiffs complain in their Supplementary Brief) is currently pending in a proceeding in the FCC on a complaint brought by PSE.

[2]Although we demonstrate here that no preliminary injunctive relief is warranted, Rule 65(c) of the Federal Rules of Civil Procedure makes the equivalent demand on plaintiffs that AT&T made before approving the transfers: security in the event of default.

Plaintiffs' Supplementary Brief and submissions are either indifferent to, or ignorant of these consequences, which result directly from plaintiffs' attempted arrangements.[3] But these are the serious, potential liabilities AT&T faces, and they more than justify the reasonableness of AT&T's actions in refusing to give carte blanche approval to these transfers.

The curiosity of plaintiffs' argument is further compounded by the fact that the Inga companies and CCI, while complaining of AT&T's alleged wrongdoing, in fact base their supposed "injury" from the effect on them from the price competition *other resellers* offer.[4] CCI and Winback thus demand a right to be shielded from price competition by drawing on a concomitant "right" they claim to pursue a business plan to completion. *See* Shipp Certification II at ¶¶34, 35. ("CCI needs two things in order to carry out its business plan: (i) a substantial volume of 800 inbound traffic under plans that permit termination without liability; and (ii) a contract tariff with competitive pricing".) But nowhere in plaintiffs' sprawling presentation is there any clear,

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Plaintiffs are as unlikely to post that sufficient security as they were unwilling to post the security deposit AT&T demanded.

[3]Interestingly, although the Court requested a copy of the agreements between and among the plaintiffs, those were not among the exhibits produced. Instead, plaintiffs have chosen to burden the Court with bulky, irrelevant documents. Whatever reason motivated plaintiffs to disregard the Court's request, we remain uninformed of the details of their arrangements.

[4]It would appear, for example, that plaintiffs CCI and Winback are complaining about the price competition plaintiff PSE offers by virtue of PSE's subscription to Contract Tariff 516.

cognizable legal justification for the creation of a *right* to have these conditions be met by Court Order, and certainly not on a "preliminary" basis.

STATEMENT OF FACTS

A brief review of the transactions that prompted this action provides the context for the denial of plaintiffs' request.[5]

Plaintiff Winback and Conserve, one of many "Inga Companies" engaged in resale, attempted to transfer eight CSTP-II *plans* to plaintiff Combined Companies, Inc. ("CCI"). Simultaneously with that transaction, CCI tried to transfer the overwhelming preponderance of enduser *locations* on those plans to plaintiff Public Service Enterprises, Inc. ("PSE"). Plaintiffs admit that these transactions were structured so that PSE would not accept the plans. (Plf. Supp. Brf. at 4.) The net effect of these maneuvers was to divorce the service, which produces the revenue stream to satisfy the revenue commitments Winback made,

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[5]Plaintiffs' answer to the Court's inquiry about whether any other Court has granted a preliminary injunction and referred a matter to the FCC is not entirely accurate. While it is true that the NCA case, cited at p. 37 of plaintiff's Supplementary Brief ("Plf. Supp. Brf.") and different from the NCA case recently decided by the Second Circuit, granted a preliminary injunction and thereafter referred a question to the FCC, two points are worth noting. First, the Court inquired on its own about primary jurisdiction and both parties argued that no reference was required and urged the Court not to refer a question. Second, the injunction sought there was a garden variety, prohibitive injunction that preserved the status quo ante. Here, plaintiffs seek a dramatic alteration of the status quo in a situation that is tailor made for resolution by the FCC.

from the party liable for the failure to achieve those commitments.

AT&T recognized that Winback's and CCI's simultaneous transactions isolated the liability for shortfall and termination charges in CCI, a newly formed company with neither assets nor an established credit history, while at the same time depriving CCI of the revenue stream to satisfy the commitments for which CCI was now responsible. AT&T processed CCI's request by applying its usual credit analysis for new customers. Finding that CCI had no credit history of record or a past record of payment to AT&T, AT&T required CCI to deposit security with AT&T before AT&T could complete the transfer to CCI. Because the $54.16 million annual commitment was extraordinarily high, especially for a start-up company, AT&T requested the maximum security deposit allowed under the tariff, three months' committed usage, in this case $13.54 million. (Certification of Carl Williams ("Williams Cert."), ¶¶ 16-24.) When CCI refused to post that deposit, AT&T declined to carry out the transfers.

Frustrated in carrying out their scheme, Inga and CCI concocted yet another plan to transfer all of the *service* (with isolated exceptions) to PSE. The transparent purpose of this transaction was to attempt to avoid satisfying the tariff's obligation to post a security deposit as a result of CCI's demonstrated lack of credit history. AT&T recognized this effort to leave shortfall and termination liability for the eight CSTP-II

plans in an entity stripped of the revenue stream to satisfy those commitments. AT&T again declined to carry out this transaction as proposed by Inga and CCI.

The financial risk that AT&T faces from these transactions is real, substantial and irremediable. Plaintiffs' efforts to characterize this risk as illusory or imagined are dispelled by the facts. The Inga plans have $130,233,333.34 in revenue commitments over the remaining life of the plans. (Williams Cert., ¶26.) By endeavoring to transfer nearly all the *service* on those plans to PSE from which revenue is derived, while retaining the *plans* and their constituent revenue commitments in entities that have no hard assets and no substantial revenue stream from usage, plaintiffs deliberately designed a transaction guaranteed to impose financial risk that the tariff recognizes as inapplicable on AT&T.[6]

AT&T has experienced serious and substantial problems with missed payments and "bad debt" from delinquent resellers' accounts. (Williams Cert., ¶ 4.) The delinquency rate for resellers is well beyond what is considered acceptable. (*Id.*) For example, in 1993, AT&T had a 12.77% delinquency rate over 180 days for SDN resellers. (*Id.*)

These delinquencies have resulted in substantial losses for AT&T. In the period from 1990 and 1993, AT&T sustained a total

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[6]As of March 13, 1995, four of the Inga Plans are running below their commitment levels. (*Id.* at ¶27.)

of $112,915,821 in outstanding, uncollectible debt from the 108 resellers that were disconnected by AT&T for non-payment. (*Id.*, ¶ 5.) AT&T had only $1,487,500 in security deposits for these accounts, which resulted in losses totalling $111,428,321. (*Id.*) In 1993 alone, AT&T recorded $52,604,041 in outstanding debt from the 42 resellers it disconnected for non-payment, and it had only $620,000 of security on deposit to offset these losses.[7] (*Id.*) As a result, AT&T has strengthened its credit procedures.

Security deposit requirements are essential to AT&T's effort to limit losses. (*Id.*, ¶ 9.) AT&T has the right to require security deposits under F.C.C. Tariff No. 1 ("Tariff 1"), § 2.5.6 and under F.C.C. Tariff No. 2 ("Tariff No. 2"), § 2.5.8. (*Id.*) The tariffed security deposit clauses allow AT&T to require a deposit from any customer who has a proven history of late payments or "whose financial responsibility is not a matter of record." (*Id.*)

Typically, AT&T holds security deposits for one year. (*Id.*, ¶ 11.) If, after one year, the payment history of the customer is determined to be acceptable, the security deposit requirement is waived and any security deposits on file are returned to the customer. (*Id.*) If, however, the customer's payment history

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[7] From October, 1993, when AT&T first wrote off its book debt from resellers until December, 1994, it has written of $36,444,825.59 of resellers' debt. (*Id.*, ¶ 7.) Of that amount, $11,741,718.49 resulted from usage charges, $17,788,066.67 resulted from termination charges, $5,944,357.93 resulted from shortfall charges, and $970,684.50 resulted from minimum commitment charges. (*Id.*)

has proven unacceptable, the security deposit requirement may be extended. (*Id.*)

From 1990 until the present, a total of $37,361,709 of security deposits have been required by AT&T from current or prospective reseller customers (excluding aggregators of CSTP II) in order to be eligible for new or additional AT&T service. (*Id.*, ¶ 12.) AT&T received a total of $18,331,206 in security deposits during this period. (*Id.*)

AT&T's Credit Management Group performs an analysis of the creditworthiness and assessing the credit risk of each new customer and of existing customers that request additional service. (*Id.* ¶ 14.) When a new customer requests service from SMD, the company's identity along with the type of service requested and the monetary commitment anticipated are forwarded to AT&T Domestic Treasury Operations ("DTO"). (*Id.*, ¶ 15.) DTO performs a risk analysis, primarily from the information gathered by Dun & Bradstreet on that company. DTO then makes its recommendation to the Credit Management Group regarding the suggested security requirement for the customer. The DTO recommendation is normally accepted by SMD. (*Id.*)

For newly formed companies such as CCI, if DTO finds that this company has no assets and/or no credit history, AT&T routinely demands the maximum security deposit permissible under the tariff, which is equal to three months of the company's expected revenue commitment. (*Id.*, ¶ 16.) That is what happened here. Similarly,

for existing customers that request additional service or a higher commitment on an existing service but who have problems during the credit review, AT&T requires a deposit equivalent to two or three months of the additional expected revenue commitment. (*Id.*, ¶¶ 17, 18.)

When Mr. Inga attempted to transfer his eight CSTP-II plans (the "Inga Plans") to CCI, a newly formed company, the Credit Management Group followed all of its normal procedures regarding security deposits as a matter of routine. (*Id.*, ¶ 22.) The identity of CCI was forwarded by the Credit Management Group to the DTO for a credit analysis, but the DTO discovered that no information about CCI was available from Dun & Bradstreet. (*Id.*, ¶ 22.) Consistently with its regular practice for newly formed companies, the DTO recommended that the maximum security deposit be required of CCI. (*Id.*, ¶ 23.)

Based on the DTO's recommendation, the Credit Management Group required a security deposit from CCI equal to three months of the commitments in the plans. That translated into a $13.54 million security deposit, based on the $54.16 million total annual commitment of the Inga Plans that were to be transferred to CCI. (*Id.*, ¶ 24.)

A review of the transactions contemplated by plaintiffs also proves that the transfer of the Inga Plans to CCI presented substantial credit risks to AT&T. That is because the transfer of the *plans* to CCI was but an interim step to transfer the service to

PSE, leaving the plans intact with CCI, an entity without the traffic to generate revenues to meet the significant revenue commitments extant in the plans. If the Inga Plans had been transferred to CCI, CCI would be responsible for all future liabilities of the $54.16 annual revenue commitment, but without the means to achieve the promised commitments. (*Id.*, ¶ 25.)[8]

It is no answer to this risk to say that these plans may be discontinued without liability. To discontinue a pre-June 1994 plan without liability a reseller must make an equal or greater revenue commitment to AT&T for a *new* plan, thereby postponing liability for shortfall and termination; those promises thus do not extinguish the liability, they merely put off the day of reckoning. But that new plan, would unquestionably be subject, pursuant to the filed tariff, to shortfall and termination charges. Thus plaintiffs' argument that there is supposedly no termination liability on *these* plans is misleading. Plaintiffs can achieve a *current* discontinuation without liability only by making a greater promise to AT&T, to substitute for a lesser promise that has gone unfulfilled.

Plaintiffs, by refusing to pay the security deposit AT&T demanded pursuant to a filed tariff, directly challenge the meaning and interpretation of AT&T's filed tariffs as well as the meaning and purpose of Tariff Transmittal 8179. That issue is currently

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[8]Winback, likewise barren of traffic to generate revenue would also be practically unable to satisfy the commitment.

being contested in the FCC. Likewise pending in the FCC is a proceeding, instituted by plaintiff PSE against AT&T, challenging the legality under the Communications Act of the 90 day window for subscription contained in a Contract Tariff.

ARGUMENT

I. PLAINTIFFS HAVE MADE NO ATTEMPT TO SHOW THAT THEY ARE ENTITLED TO A PRELIMINARY INJUNCTION.

AT&T demonstrated in its initial brief that plaintiffs have not satisfied any of the four requirements for preliminary injunctive relief: 1) a likelihood of success on the merits; 2) a danger that the applicant will suffer irreparable harm; 3) that the balance of equities favors the applicant; and 4) that the public interest would be served by order. *Opticians Ass'n of America v. Independent Opticians of America,* 920 F.2d 187 (3d Cir. 1990). Plaintiffs' Supplemental Brief does not even attempt to demonstrate plaintiffs' entitlement to such relief on the facts and law here.

Plaintiffs' failure to attempt even to make an argument showing their entitlement to preliminary injunction relief is demonstration enough of their application's lack of merit. Consideration of just the requirements of irreparable harm and likelihood of success proves that plaintiffs' application should be denied.

Plaintiffs effectively admit they have no genuine irreparable harm when they concede that this case "is about money," as Mr. Meanor put it at argument. (Trans. Mar. 8, 1995, p. 69, l. 14). A case about money, where money damages suffice to compensate, as in this case, is not appropriate for preliminary injunctive relief. But there is in Mr. Meanor's observation even more mischief manifest. Should this Court grant any part of the

relief sought, only thereafter to conclude, (or be directed) to vacate the preliminary injunction, the revenue lost to AT&T as a result of the service transfer would be beyond the capability of the plaintiffs to redress. That fact reinforces the conclusion to deny the motion.

There is likewise no probability of success on the merits, for, having argued in their initial brief -- without success -- that service as used in § 406 encompassed more than service to endusers, plaintiffs now say that the real wrong they want to redress is the Inga Companies' failure to obtain service under a Contract Tariff and, particularly, Contract Tariff 516. There are several reasons this new theory also fails. First, as Inga admits, he never asked to subscribe to Contract Tariff 516 (Inga Certification, ¶ 31). Second, Contract Tariff 516 has long been closed for subscription by its own terms.

Plaintiffs suggest, of course, that they somehow have a right to Contract Tariff 516, that the 90 day subscription period is unreasonable and therefore unlawful under the Communications Act. But, understandably, plaintiffs provide *no* basis for a *right* to a Contract Tariff except by asking for and qualifying for a Contract Tariff within the subscription period specified in the Tariff. As to the legality of the 90 day subscription period, that issue too is currently in litigation before the FCC concerning Contract Tariff 120 by virtue of a Complaint filed in the FCC by

PSE, one of the plaintiffs here. That proceeding is yet another reason to defer to FCC action here.

Plaintiffs also argue, again without authority, that the 90-day ordering window contained in AT&T's Contract Tariff 516 "can have no application in the resale context" because it restricts resale opportunities. (Plf. Supp. Brief at 43). That contention is false.[9] The Commission has permitted several tariffs to go into effect with identical 90-day window provisions. *See In the Matter of AT&T Communications Contract Tariff F.C.C. No. 2-7, 9-13 and 15,* FCC 93-537, released January 19, 1994 ("*90-Day Window Order*").

A contract tariff is valid under Section 202(a) so long as it is available to other similarly situated customers willing and able to meet the contract's terms. *Interexchange Competition,* 6 F.C.C.R. at 5903 ¶129 (citing *Sea-Land Service, Inc. v. I.C.C.* 738 F.2d 1311, 1317 (D.D.C. 1984), and *MCI Telecommunications Corp. v. FCC,* 917 F.2d 30, 38 (D.D.C. 1990)). The 90-day ordering window in Contract Tariff 516 thus goes far beyond the minimal requirements of Section 202(a). That Section requires that rates be available as of right only to those similarly situated customers who place orders "essentially contemporaneous[ly]" with the filing of the rate.

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[9]Some twenty resellers take service from AT&T pursuant to thirty Contract Tariffs. (Certification of Richard Higginson.)

The Commission has elsewhere rejected claims that ordering windows are facially unlawful under Section 202(a). Indeed, in its original Tariff 12 order, the Commission held that while certain geographic restrictions were unreasonable on their face, *In the Matter of AT&T Communications Revisions to Tariff F.C.C. No. 12,* 4 F.C.C.R. 4932, 4938-39 ¶¶ 57-59 (1989), "limitations on the time periods during which customers may order service" are not *per se* discriminatory.

Plaintiffs have similarly demonstrated no right to relief under Section 406 for the requested transfers of service. They have no authority to construe the term "services," beyond that contemplated by the statute.[10] More importantly, such a definition does not alter the fact that plaintiffs' "right" to receive the transfer of services fails even to approach the "clear and unequivocal" requirement under Section 406. *Mical Communications, Inc. v. Sprint Telemedia, Inc.,* 1 F.3d 1031, 1039 (10th Cir. 1993).

Brushing aside the "clear and unequivocal" requirement of § 406 (surely because they cannot meet it), plaintiffs argue that AT&T is compelled to provide them with "additional benefits" to bring them in line with their reseller competitors who have quali-

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[10]Plaintiffs' conclusory statement that a request to discontinue or transfer a CSTP is a refusal to provide "services" is what they must prove, not what they may assume. The former of these two claims is simply illogical and contradictory. And the latter is not even supported in the one case that construes "services" most broadly. *See Mical Communications, Inc. v. Sprint Telemedia, Inc.,* 1 F.3d 1031, 1036 n. 2 (10th Cir. 1993).

fied under the tariffs. This argument is nothing less than a statement that they are entitled, as a matter of law, to have AT&T assist their competition with other resellers.

The Kearney Certification is illustrative. Kearney says that his customer base has been decimated by other resellers with access to Contract Tariff 516, including presumably PSE. (Kearney Cert. ¶4). But he also would have the Court believe that "the main reason for the [proposed] transfer" was a result of other AT&T direct offerings. (Kearney Cert. ¶3). Whether these statements are true is immaterial. What Kearney, Inga and Shipp all complain about is price competition in the marketplace from other resellers.

Competition is, however, precisely the goal of the FCC's resale orders. That competition is occurring is not something about which Inga, Shipp or anyone else can legitimately complain. If plaintiffs received the relief that they say they need, and to which they say they are entitled, they would establish a rule by which AT&T would be obligated to assure against plaintiffs losses in a competitive arena. That is not the law.[11] *See Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 600 (1985); *see also Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986) *cert. denied*, 480 U.S. 934 (1987)

[11]Plaintiffs' supplementary brief makes many remarkable arguments, this among them. Perhaps confronted with the practical reality disproving their argument, plaintiffs will resort to the tactic of their Point VI to say that the ordinary rules of law and of the American commercial marketplace do not apply. But such arguments are themselves proof of the legal bankruptcy of plaintiffs' positions.

(no general duty to "help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches").

Whatever Section 406 was intended to prevent, it is not a command to the service provider to expose itself to unreasonable financial risk or to comply with illegitimate schemes to get service without having to pay tariffed charges. Plaintiffs have thus shown no likelihood of success on the merits.

A mandatory preliminary injunction, as that which plaintiffs seek, is to be granted only when the exigency of the circumstances, the facts, and the law are clearly in favor of the parties moving for the injunction. *Martinez v. Mathews,* 544 F.2d 1233, 1243 (5th Cir. 1976) (mandatory preliminary relief . . . is particularly disfavored and should be issued when the facts and law clearly favor the moving party); *Sov. Order of St. John of Jerusalem-Knights v. Messineo,* 572 F. Supp. 983, 988 (E.D. Pa. 1983); *Jackson v. Conway,* 476 F. Supp. 896, 902 (E.D. Mo. 1979), *aff'd,* 620 F.2d 680 (8th Cir. 1980). The plaintiffs have simply not demonstrated a clear entitlement to the relief they seek, the equivalent of full, final relief. *See Diversified Mortg. Investors v. U.S. Life Ins. Co. of N.Y.,* 544 F.2d 571, 576 (2d Cir. 1976); *Jackson v. Conway,* 476 F. Supp. at 902 (mandatory preliminary injunctions should be granted in rare instances, especially if the grant of the temporary injunction would in effect give the plaintiffs the relief which they seek in the main case). A manda-

tory preliminary injunction should be granted at the preliminary stage of the proceedings only in "rare instances" where facts and law are clearly in favor of moving party, especially if the grant of the temporary injunction would "in effect give plaintiff the relief which he seeks in the main case." *Miami Beach Fed. Sav. & Loan Ass'n v. Callander,* 256 F.2d 410 (5th Cir. 1958); *Bricklayers, Masons, et al. v. Lueder Const. Co.,* 346 F. Supp. 558, 561 (D. Neb. 1972). That is not this case, where a decision requires the balancing and application of complex tariff regulations to determine the appropriateness of AT&T's conduct under the Communications Act.

Plaintiffs choose to rely on *National Communications Ass'n, Inc. v. American Telephone & Telegraph Co.*, 813 F. Supp. 259 (S.D.N.Y. 1993), readily distinguishable from this case, as a reason to obtain relief here. *NCA*, however, does not stand for the proposition that an injunction is appropriate when primary jurisdiction is invoked. In any event, the relief in *NCA* preserved the status quo, it did not alter the status quo.[12]

The salient purpose of a preliminary injunction, of course, is to *maintain* the status quo pending final determination

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[12]Plaintiffs cited this *NCA* case in response to the Court's query about cases in which preliminary injunction issued where primary jurisdiction was also invoked. Courts have usually denied preliminary injunctions when invoking primary jurisdiction. *E.g., Detroit, Toledo & Ironton Ry. Co. v. Consol. Rail Corp.*, 727 F.2d 1391, 1399 (6th Cir. 1984) (reversing entry of preliminary injunction on grounds of primary jurisdiction); *Bartlett & Co., Grain v. Union Pacific Ry. Co.*, 528 F. Supp. 1234, 1239 (W.D. Mo. 1981).

on the merits. *Diversified Mortg. Investors,* 544 at 576 (2d. Cir. 1976); *Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp.,* 441 F.2d 560 (5th Cir. 1971). In *NCA*, the Court advanced that purpose by ordering AT&T to return to the pre-November 1992 billing practice on the explicit rationale to "maintain the status quo as it existed between the parties" before AT&T changed its billing practice. *National Communcations,* 813 F. Supp. at 266 (emphasis supplied).[13]

National Communications is thus distinguishable, because the plaintiffs here seek to alter the status quo, not maintain it. *See, e.g., Exhibitors Poster Exch.,* 441 F.2d at 561 (5th Cir. 1971) (the purpose of a preliminary injunction is to preserve the status quo . . . until . . . a trial on the merits); *St. John of Jerusalem-Knights,* 572 F. Supp. at 988 (preliminary injunctions are granted to maintain the status quo); *Perez-Funez v. District Director, I.N.S.,* 611 F. Supp. 990, 1001 (D.C. Cal. 1984) (the purpose of a preliminary injunction is to preserve the *status quo* pending a determination of the merits); *Granny Goose Foods, Inc. v. International Bhd. of Teamsters,* 415 U.S. 423 (1974); *Warner Bros. Inc. v. Dae Rim Trading, Inc.,* 877 F.2d 1120 (2d Cir. 1989); *Willheim v. Investors Diversified Services, Inc.* 303 F.2d 276 (2d Cir. 1962).

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[13]The Court in *NCA* had invited the parties' views on a primary jurisdiction referral. Although both NCA and AT&T believed that such referral was not required, the Court granted the injunction and sent the narrow issue there in controversy for final disposition to the FCC.

II. THIS COURT SHOULD INVOKE THE DOCTRINE OF PRIMARY JURISDICTION TO DENY PLAINTIFFS' APPLICATION AND DISMISS THIS ACTION.

The proceeding regarding Tariff Transmittal No. 8179, which is now before the FCC with the parties to this action participating, will, in fact, dispose of the critical issue in this case: do the existing tariffs permit AT&T to protect itself by requiring security deposits or preventing subscribers from separating short-fall and termination liability from the accounts whose revenue secure such liabilities? Plaintiffs' suggestion that Tariff Transmittal No. 8719 is of no relevance to the issues in this action misapprehends the nature of that proceeding.

A. Plaintiffs' Actions Raise A Risk of Inconsistent Judgments.

Nothing plaintiffs say changes the conclusion that the pending proceedings before the FCC compel this Court to deny this application and invoke the doctrine of primary jurisdiction. *See Mississippi Power & Light Co. v. United Gas Pipe Line*, 532 F.2d 412, 420 (5th Cir. 1976) ("advisability of invoking primary jurisdiction is greatest when the issue is already before the agency."), *cert. denied*, 429 U.S. 1094 (1977).

The application of Tariff Transmittal No. 8179 would affect both issues in this case and thousands of subscribers to AT&T's Tariffs. Plaintiffs acknowledged that in the FCC. *See*

Petition to Reject of Combined Companies, Inc. at 1.[14] The Tariff Bureau's order will thus unquestionably affect core issues in this case, and thereby create the potential for inconsistent rulings that can be avoided only by invoking primary jurisdiction.

The FCC proceeding regarding Tariff Transmittal 8179 deals squarely with issues at the heart of the plaintiffs' application to force transfer of the service to PSE without transferring the underlying plans.[15] AT&T's brief opposing the temporary restraining order demonstrated Tariff Transmittal 8179 purpose to clarify AT&T's and subscribers' existing obligations concerning transfer of service under AT&T FCC Tariff Nos. 1 and 2.

By plaintiffs' own admission, the FCC's Tariff Bureau is empowered to examine "whether the tariff provisions being added or amended are just and reasonable, and unduly discriminatory; and/or whether the tariff language is clear and unambiguous." (Plf. Supp. Brf. at 27.). That conceded authority creates the threat of incon-

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[14]This petition is attached as Exhibit D to the Meade Certification.

[15]The Court should also recall that plaintiffs attempted two separate transactions to achieve the same result. The first, when CCI was to accept the plans but transfer the service, involved AT&T's requirement of security deposit from CCI pursuant to the Tariff. The second transaction that Inga and Shipp structured when CCI was unable to make the required deposit, involved AT&T's refusal to transfer service away from the plans, leaving them unable to meet service commitments. As to the first, there is no question of AT&T's right pursuant to tariff to act; as to the second, Tariff Transmittal 8179 addresses that issue to make explicit AT&T's implicit rights under the tariff. Accordingly, the proceeding in the FCC will resolve that issue, the only issue of meaningful controversy open in these transactions.

sistent judgments between this Court and the FCC on this same issue. For plaintiffs to argue otherwise simply ignores the facts.

Plaintiffs' further argument that Transmittal No. 8179 is "irrelevant" because, according to plaintiffs, the tariff modifications have no retrospective effect utterly misreads the nature of the proceeding at the FCC. Tariff Transmittal 8179 merely makes explicit what had been AT&T's implicit right under tariff to refuse to implement transfers whose ulterior purpose was to prevent AT&T from collecting on tariffed short-fall and termination obligations. Although Tariff Transmittal No. 8179 does propose that additional language be added to AT&T F.C.C. Tariffs Nos. 1 and 2, AT&T is clearly seeking to clarify, not modify, the existing rights and liabilities under the tariff.

Even if the FCC somehow deems the Tariff Transmittal to constitute a modification of AT&T's existing tariffs,[16] the agency nevertheless has the clear power to make such modifications retroactive. *See TRT Telecommunications Corp. v. F.C.C.*, 857 F.2d 1535, 1545 (D.C. Cir. 1988) (the FCC has the authority to provide retrospective relief); *Bell Telephone Co. of Pennsylvania v. F.C.C.*, 761

[16]Although AT&T does not intend for this Transmittal to modify any existing tariffs, rights and obligations, AT&T satisfies the substantial cause test required for modifying tariff language. *See Showtime Networks, Inc. v. F.C.C.*, 932 F.2d 1, 3-4 (D.C. Cir. 1991) ("substantial cause" test for tariff revision a gloss on the just and reasonable standard set by 47 U.S.C. 201(b)). AT&T made precisely this argument to the FCC in Tariff Transmittal No. 8179. *See* Meade Letter of February 16, 1995. (The Meade letter is attached as exhibit B to Certification of Richard R. Meade filed in this matter on March 7, 1995.)

F.2d 789, 792 (D.C. Cir. 1985) (authorizing FCC to order retroactive rate-setting). Such retrospective application would be appropriate in this case as AT&T has made its Tariff Transmittal No. 8179 in response to a scheme to avoid paying tariff charges. Certainly, it is not "just and reasonable" for Tariff Transmittal No. 8179 to be approved but be made inapplicable to cure the problem which spurred AT&T to act.

B. The FCC Is The Proper Forum For Determining The Parties Rights And Obligations Under The Tariffs And the Communications Act.

There is simply no question that issues of tariff interpretation and application, and issues whether a given practice is "unreasonable," under the Communications Act should be decided in the first instance by the applicable administrative agency. *Allnet Communication Service, Inc. v. National Exchange Carrier Ass'n, Inc.*, 965 F.2d 1118, 1121 (D.C. Cir. 1992); *In re Long Distance Telecommunications Litigation*, 831 F.2d 627, 631 (6th Cir. 1987). The issues of AT&T's reasonableness in demanding security as well as the reasonableness of the 90 day subscription window in Contract Tariffs are both now before the Commission, as well as implicated in this action. Those facts compel invocation of primary jurisdiction here to dismiss this action pending FCC action.

Plaintiffs would have the Court believe that AT&T's ability to request security deposits or protect itself against fraud is simply not applicable when plaintiffs make a "reasonable"

request for service. (Plf. Supp. Brf. at 30). The reality is otherwise. The Tariff is clear that, whether or not a request is reasonable, AT&T has a right to be secure in its financial exposure for providing service.[17]

The following tariff provisions, at a minimum, must be construed in deciding plaintiffs' claims: Tariff No. 2, §2.1 (A-C), §2.5.8(A); the general prohibitions against fraudulent schemes to avoid payment of tariffed charges (Tariff No. 2, §2.2.4.A.2) and AT&T's right to restrict or suspend a customer's service Tariff No. 2, §2.8.2).[18] While AT&T actions are reasonable to protect its

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[17]This is, in part, the consideration for the duty of a common carrier to provide service.

[18]The above-listed tariff provisions are as follows:

2.1.8 **Transfer or Assignment** - WATS, including any associated telephone number(s), may be transferred or assigned to a new Customer, provided that:

A. The Customer of record (former Customer) requests in writing that the Company transfer or assign WATS to the new Customer.

B. The new Customer notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s), including the unexpired portion of any term of service and usage or revenue commitment(s).

C. The Company acknowledges the transfer or assignment in writing. The acknowledgment will be made within 15 days of receipt of notification.

2.5.8. **Deposits** - The following deposit provisions are applicable to WATS.

A. To safeguard its interests, the Company will only require a Customer which has a proven history of late payments to the Company or whose financial responsibility is not a matter of record, to

financial interest, justified under the tariffs, the proper body to assess the reasonableness of AT&T's and the plaintiffs' actions here is the FCC, not this Court, because of the invocation of FCC policies. Significantly, plaintiffs also admit that the FCC has a primary role in adjudicating their claims, for their supposed "entitlement" is alleged in the Complaint to be under "the law, *as applied by the FCC*. . . ." (Complaint, ¶72). The FCC, not this Court, is accordingly the proper body to harmonize these tariff provisions in light of its policy expertise and the congressional

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make a deposit to be held as a guarantee for the payment of charges. A deposit does not relieve the Customer of the responsibility for the prompt payment of bills on presentation. In lieu of a cash deposit, the Company will accept, as a deposit, Bank Letters of Credit or Surety Bonds. The deposit will not exceed an amount equal to three months estimated usage charges and access line charges associated with AT&T 800 Service and AT&T WATS or in the case of Custom 800 Services, three times the sum of the estimated average monthly usage charges and monthly service charge.

2.2.4. **Fraudulent Use** - The fraudulent use of, or the intended or attempted fraudulent use of, WATS is prohibited. The following activities constitute fraudulent use:

A. Using or attempting to use WATS with the intent to avoid the payment, either in whole or in part, of any of the Company's tariffed charges by:

* * *

2. Using fraudulent means or devices, tricks, schemes, false or invalid numbers, false credit devices, or electronic devices.

2.8.2. **Interference, Impairment or Improper Use** - The Company may take immediate action to temporarily suspend service when a Customer violation results in any of the following:

* * *

- circumvents the Company's ability to charge for its services as specified in Section 2.2.4. (Fraudulent Use) preceding, or . . . .

intendment to apply consistent requirements to the nation's telecommunication common carriers. *See Vortex Communications, Inc. v. American Telephone and Telegraph Co.*, 828 F. Supp. 19, 21 (S.D.N.Y. 1993).

Finally, plaintiffs' argument that they have the exclusive right to be in this Court under § 207 of Federal Communications Act ignores the fact that § 207 is merely a jurisdictional statute and does not prevent the application of the doctrine of primary jurisdiction. To the contrary, Section 207 "does not dictate where the suit must be brought." *Southwestern Bell Tel. Co. v. Allnet Communications Services, Inc.*, 789 F. Supp. 302, 305 (S.D. Mo. 1992). "[Section 207] does not prohibit the court from withholding decisions until the Commission has spoken on technical or policy questions that would determine the outcome." *Allnet Communication Service*, 965 F.2d at 1122. A court may invoke the doctrine of primary jurisdiction, consistently with § 207, in order to advance the central purpose of the adjudicatory process: to have a just, informed resolution by the body best situated to decide the issues in controversy. *Id.* Plaintiffs are simply wrong in stating that § 207 *requires* the Court to entertain this action.

C. The Federal Communications Commission Has The Authority To Afford Emergent Relief.

Although Plaintiffs disparage the FCC and its willingness to grant emergent relief, the authority of the Federal Communications Commission ("FCC") to afford relief to individual

petitioners on an emergent basis is unquestioned. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-181 (1968); *In the Matter of Petitions Filed by the EEOC*, 38 F.C.C. 2d 33, 38-39 (1972); *see, e.g., In re: Pocahontas Cable TV, Inc.*, 64 F.C.C. 2d 698 (1977); *In re: Big Valley Cablevision, Inc.*, 85 F.C.C. 2d 973 (1981); *In the Matter of Comark Cable Fund 111*, 104 F.C.C. 2d 451 (1985); *Business Wats, Inc. v. AT&T*, 7 F.C.C.R. 7942 (1992). Such emergent relief includes the issuance of orders for a stay or similar preliminary injunctive relief. *See In re Application of Eldon L. Hueber*, 6 F.C.C.R. 736 (1991).

Indeed, the FCC follows the four same requirements that are followed by the federal courts: likelihood of success on the merits, irreparable harm, balance of hardships, and public interest. *Big Valley Cablevision,* 85 F.C.C. 2d at 978 (1981); *Comark Cable Fund* 111, 104 F.C.C. 2d 451 (1985); *Pocahontas Cable TV*, 64 F.C.C. 2d at 699 (1977). The United States Supreme Court has acknowledged the broad power of the FCC to act when "special or additional forms of relief are imperative." *Southwestern Cable Co.*, 392 U.S. at 180. The Court stated that it was due to the need for such flexibility "that Congress declined to 'stereotype the powers of the Commission.'" *Id.* (citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

The Communications Act thus empowers the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in

the execution of its functions." 47 U.S.C. § 154(i).[19] Regulations and orders issued pursuant to this sub-section have the force of law. *Red River Broadcasting Co. v. FCC,* 98 F.2d 282, 285 (D.D.C.) *cert. denied,* 305 U.S. 625 (1938). The Communications Act also grants the Commission the discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). It is for the FCC to determine how it is to achieve these ends. *Federal Communications Comm'n v. Station WJR,* 337 U.S. 265, 282 (1949); see *In the Matter of Petitions Filed By The EEOC,* 38 F.C.C. 2d 33 (1972).

Plaintiffs' argument that the FCC is somehow unprepared or unwilling to award the type of relief they seek where or when justified is an affront to the FCC's commitment to enforce the law it is statutorily obligated to administer. The FCC's statutory authority is clear. The FCC's procedural flexibility, moreover, enables it to fashion relief more varied and comprehensive than available even from this Court. The Court should therefore look beyond plaintiffs' rhetoric and speculation, and recognize that the FCC, which has the authority to act quickly the statutory obligation to administer the law to grant broad relief, is the proper forum for this dispute.

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[19]The Administrative Procedure Act defines an "order" as including the whole or part of a final disposition, whether "affirmative, negative, injunctive or declaratory . . . ." 5 U.S.C. § 551.

CONCLUSION

For all the foregoing reasons, Defendant AT&T Corp. requests that the Court deny plaintiffs' application for a preliminary injunction and grant AT&T's motion to dismiss on the grounds of primary jurisdiction.

Respectfully submitted,

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EXHIBIT K

STAMP & RETURN

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

JOINT PETITION FOR DECLARATORY RULING
ON THE ASSIGNMENT OF ACCOUNTS (TRAFFIC)
WITHOUT THE ASSOCIATED CSTP II PLANS
UNDER AT&T TARIFF F.C.C. NO. 2

ON REFERRAL BY THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

COMBINED COMPANIES, INC.
and
WINBACK & CONSERVE PROGRAM, INC.,
ONE STOP FINANCIAL, INC.,
GROUP DISCOUNTS, INC.
800 DISCOUNTS, INC.,

Petitioners,

and

AT&T CORP.,

Respondent.

To the Commission:

JOINT PETITION FOR DECLARATORY RULING

Helein & Associates, P.C.
8180 Greensboro Drive
Suite 700
McLean, Virginia 22102
Attorneys for Petitioners

Dated: July 15, 1996

The minimum payment period is calculated from the date that billing started after (1) the initial installation, or (2) a reinstallation after a move or change.

(See Section 2.5.9.A. for the definition of recurring charge; Section 2.5.9.E. for nonrecurring charge (Exhibit L).) The definition of "minimum payment period" does not include the unexpired portion of any term of service or usage or revenue commitments.

AT&T Had a Standard Practice of Permitting the Transfer of Traffic Under CSTP II Without Transferring the Plans Themselves.

AT&T has routinely engaged in allowing traffic under CSTP II plans to be transferred without demanding that entire plan be transferred or only after it obtains a deposit. (Exhibits M and N). Indeed, AT&T's filing of Transmittal 8179 evidences that the practice of making traffic-only transfers was routine, or AT&T would not have attempted a tariff revision to prohibit such practice.

AT&T filed its Tariff Transmittal 8179 on February 16, 1995, within days of Petitioners' suit for AT&T's refusal to effect the requested transfers. In Transmittal 8179, AT&T proposed to limit the ability of resellers to transfer traffic under plans without transferring the plans themselves[8]. Petitioners' and other aggregators, however, had filed substantive protests against AT&T's attempt to prohibit this routine practice. The arguments in opposition to Transmittal 8179 highlighted the anti-resale aspects of AT&T's attempt to use the tariffing process to quell expansion of aggregated services:

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[8] AT&T attempted to avoid the consequences of its having filed Transmittal 8179 and the requirement that all tariff revisions be prospective in effect by calling the filing a "clarification." Regardless of the euphemisms used, AT&T could not escape the consequences of its actions. No FCC policy, rule, or decision exists which supports AT&T's reliance on characterizing 8179 as a "clarification," that a "clarification" may retroactively adversely affect the substantive rights of AT&T's customers, or that revisions which have sparked substantive protests implicating tariff law and resale policy may be treated as something less than what they are in the regulatory context.

> In the current long distance marketplace, which is characterized by proliferating and constantly changing sets of options, resellers must be able to move traffic -- and to move it quickly -- in order to respond to competition and to make the best possible product available to consumers. . . . By restricting the ability of resellers to move traffic, AT&T is limiting resellers' ability to compete in the market. Indeed, we submit that it is this ability to limit resellers' responsiveness to the marketplace, and not a concern about an allegedly fraudulent future action by a single reseller, which is the prime motivation behind the proposed changes.

In the Matter of AT&T Communications Revisions to AT&T Tariff F.C.C. Nos. 1 and 2, Tariff Transmittal No. 8179, Petition of Tel-Save, Inc. to Reject or in the Alternative to Suspend and Investigate AT&T Transmittal No. 8179, February 22, 1995.

Another aggregator identified the inherent threat to resale from Transmittal 8179 as follows:

> [A] customer might well conclude that it makes economic sense to move traffic to another plan or Tariff for a period of time, and to pay whatever penalty its Contract Tariff requires, because the savings it will realize will more than offset what it must pay as a result of the shortfall. Under such circumstances, allowing the Customer to move its traffic, and thus to realize a net savings, will serve the public interest since the Customer will be better able to compete by passing on the savings to end users.

In the Matter of AT&T Communications Revisions to AT&T Tariff F.C.C. Nos. 1 and 2, Tariff Transmittal No. 8179, Petition of the Furst Group, Inc. to Reject or in the Alternative to Suspend and Investigate AT&T Transmittal No. 8179, February 22, 1995.

These arguments were responsible at least in part in preventing Transmittal 8179 from taking effect. In addition, the Commission's staff identified other problems with the transmittal and AT&T's purported reasons for having filed it. (Exhibit D). As a result, AT&T deferred the effectiveness of Transmittal 8179 seven times and then withdrew it.

Any Ambiguity in Tariff Provisions is to be Resolved Against AT&T.

The express terms of Section 2.1.8. are not ambiguous. Nothing in the plain language of Section 2.1.8 even suggests a deposit requirement on CCI's assignment of the traffic under its CSTP

II plans to PSE. This conclusion is no longer open to challenge. Section 2.1.8 has been so interpreted by the District Court in its May 19, 1995 Order, which has not been appealed, and which is not affected by the decision of the Third Circuit.

Moreover, it is of decisional significance that the only monetary references in Section 2.1.8 are those for "Record Change Only" charges. The Record Change Only section of AT&T's tariff expressly contemplates transferring locations under CSTP II plans.[9] Section 2.1.8 contains no limit on the amount of traffic or number of locations under a plan which may be transferred, and impose no deposit requirements. Read in context with other express tariff provisions, it is clear that AT&T's tariff recognized its practice of routinely accepting transfers of traffic without the plans themselves. Evidence that it was, in fact, AT&T's long-standing practice to transfer traffic without also transferring plans is at Exhibits M and N.

Further, were AT&T to assert that Section 2.1.8 is ambiguous, it would be self-defeating. If the section is viewed as ambiguous in any way, the ambiguity would be resolved in favor of Petitioners in accordance with "the usual rule that tariff ambiguities are to be resolved against the carrier." *In the Matter of RCA American Communications, Inc.*, 84 F.C.C.2d 353 (1980). *See also, American Satellite Corporation v. MCI Telecommunications Corporation*, 57 F.C.C.2d 1165, 1167 (1976); *United States v. Gulf Refining Co.*, 268 U.S. 542 (1925). *See also Western Union Corp. v. Southern Bell Tel. and Tel. Co.* 5 F.C.C.Rcd. 4853, 4855 (1990); *In re Associated Press*, 72 F.C.C. 2d 760 (1979).

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[9] See also, Section 3.3.1.Q. which imposes a charge for location changes only under CSTP II plans.

AT&T's Conduct in Refusing to Permit or Accept CCI's Transfer to PSE of Traffic without the CSTP II Plans Themselves, under the Circumstances Presented, Constituted Violations Of Section 61.54(j) of the Commission's Rules, and Sections 201, 202 and 203 of the Communications Act and the Resale Policies of the Commission.

Because tariff provisions may have prospective effect only; because ambiguous tariff provisions must be construed against the carrier; and because AT&T's tariff revisions purporting to address CCI's assignment of traffic were not duly published nor effective at the time of the transactions in question, AT&T's filings in 8179 and later in 9229 (each made subsequent to the transaction at issue here), had and could have had no effect on the transactions. AT&T's conduct in refusing to accept the transfers as submitted or only upon receipt of a deposit from CCI was therefore unjustified and unlawful in violation of the Commission Rule 61.54(j) and the express provisions of Section 203 of the Communications Act.

Without tariff provisions to prohibit the assignment of the traffic, AT&T's application of untariffed internal policies to refuse to effect the assignment of such traffic also constitutes an unreasonable practice in violation of Section 201 of the Act. Internal, untariffed policies cannot affect, modify, or impose additional deposit or other requirements not set forth in the tariff.

Nor may AT&T's tariff revisions proposed in filings made subsequent to the events and transactions which such provisions purport to address, effect, modify, or impose additional requirements affecting those transactions. AT&T's reliance nonetheless on, and use of, such pending tariff proposals constitute a separate unreasonable practice and is unlawful in violation of Section 201 of the Act.

The transactions engaged in by CCI were consistent with duly published tariffed procedures and charges expressly applicable to such transactions when made and such transactions were,

therefore, proper and consistent with AT&T's tariff requirements. AT&T's refusal, nonetheless, to honor such transactions therefore constituted an unreasonable refusal to provide service upon reasonable request in violation of Section 201 of the Act.

Where AT&T's consistent practice, as evidenced by its own tariffed provisions, is to permit aggregators like Petitioners to transfer the 800 traffic of end users without the underlying CSTP II plans, which practice is expressly authorized and governed by express tariff provisions duly published in aid of and in furtherance of facilitating such transfers, AT&T's unilateral and singular deviation from its tariffed procedures and charges and its standard practices implementing such tariffed provisions in regard only to CCI was an unreasonable practice in violation of Section 201, unduly discriminatory in violation of Section 202, and inconsistent with applicable tariffed provisions in violation of Section 203.

Because nothing in the operable tariff provisions, namely, Section 2.1.8 of AT&T's FCC Tariff No. 2, at the time the transfers were made in December, 1994 and January 1995, prohibited CCI (or any other aggregator) from transferring traffic under a CSTP II plan without transferring the whole plan itself in the same transaction, AT&T's application of non-tariffed regulations and conditions violated Section 203 and rule 61.54(j) and constituted an unreasonable practice and refusal to provide service in violation of Section 201 of the Act.

AT&T's proposed revisions to Section 2.1.8 of AT&T's FCC Tariff No. 2 contained in AT&T's Transmittal No. 8179 having been filed after the transfer of traffic was requested in January, 1995 and having as their purpose the prohibition of transferring traffic under CSTP II plans without transferring the plans themselves in the same transaction established that no such prohibitions were contained in AT&T's Tariff F.C.C. No. 2 prior to the submission of Transmittal

No. 8179. In view of both this fact and the fact that AT&T's withdrawal of its Transmittal No. 8179 was prompted by AT&T's failure to satisfy or eliminate the Commission's Tariff staff's objections to Transmittal 8179 as being unnecessary and overreaching,[10] AT&T's continued insistence on a deposit and its refusal to allow the completion of the transactions by CCI and PSE constituted continuing and deliberate practices that were unreasonable and in derogation of AT&T's duty to provide service, all in violation of Section 201 of the Act.

The revisions to Section 2.1.8 AT&T's Tariff No. 2 issued by AT&T May 9, 1996, and effective May 10, 1996, under Transmittal No. 9229 are effective from and after May 10, 1996 and are inapplicable to the issues raised by the events and circumstances surrounding the transaction of assigning CCI's traffic under its CSTP II plans to PSE occurring in January, 1995. Moreover, the post-May, 1996 effectiveness of the changes underscores and confirms that no similar conditions or requirements as set forth in these revisions existed in AT&T's tariff when the CCI transactions were made in January, 1995.

AT&T's representation to the District Court that pending revisions contained in Transmittals 9229 would, notwithstanding the withdrawal of Transmittal 8179, resolve the issue as to whether traffic could be transferred without the plans, which the District Court had referred to the FCC under the doctrine of primary jurisdiction, was, in view of AT&T's direct knowledge of the inapplicability of Transmittal 9229 when originally submitted to the Commission in October, 1995, and at all times subsequent thereto, an unreasonable practice in violation of Section 201 of the Act.

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[10] See, attachments to letter from Mary Beth Richards, Deputy Chief, Common Carrier Bureau, to Charles H. Helein, December 15, 1995. (Exhibit D.)

AT&T's policy of precluding transfers of traffic without transfers of plans based on the purported concern that the effect of the proposed transfers would be to separate the revenue stream by which applicable shortfall or termination charges could be paid from the obligations to pay shortfall or termination charges themselves is a "general rule ... regulation, exception [or] condition which govern the tariff" which "must be stated clearly and definitely" in the tariff as required by Rule 61.54(j) and Section 203 of the Communications Act.

AT&T's failure to tariff the policy of precluding transfers of traffic without transfers of plans (based on the purported concern that the effect of the proposed transfers would be to separate the revenue stream by which applicable shortfall or termination charges could be paid from the obligations to pay shortfall or termination charges themselves) is a violation of Rule 61.54(j) and Section 203 of the Act.

AT&T's refusal to permit or accept the transfer of traffic without transfers of the CSTP II plans themselves, but permitting and accepting such transfers from other aggregators like CCI under other CSTP II plans is a refusal to provide service in violation of Section 201 of the Act and is discriminatory in violation of Section 202 of the Act.

AT&T's refusal to permit the transfers of traffic without transfers of plans (based on the purported concern that the effect of the proposed transfers would be to separate the revenue stream by which applicable shortfall or termination charges could be paid from the obligations to pay shortfall or termination charges themselves) when no shortfall charges were or could be applicable, pursuant to express tariff provisions; and when no termination charges were or could be applicable because no termination of service occurred nor was intended, is an unreasonable practice in violation of Section 201 of the Act.

In January 1995, AT&T's Tariff No. 2 did not condition the transfer of traffic under plans upon transferring the plans themselves, nor did AT&T's Tariff No. 2 contain any requirement for a deposit or any limit on the amount of traffic under a plan that could be transferred.

Under the circumstances, AT&T's refusal to permit the transfer of the end user 800 traffic aggregated under the CSTP II plans originally held by the Inga Companies and transferred by court order to CCI, without Petitioners' coerced compliance with deposit and other requirements which were untariffed and which remained untariffed during all pertinent time frames preceding the filing of this Petition, violated AT&T's obligations under Sections 202 and 203 of the Communications Act of 1934; FCC Rule 61.54(j); and established Commission policies and practice on tariffing and on the promotion of resale services.

Under the circumstances, AT&T's refusal to permit the transfer of the end user 800 traffic aggregated under the CSTP II plans originally held by the Inga Companies and transferred by court order to CCI, according to the applicable procedures and charges duly published in AT&T's applicable tariff, and without Petitioners' coerced compliance with deposit and other requirements which were untariffed and which remained untariffed during all pertinent time frames preceding the filing of this Petition, violated AT&T's obligations under Section 201 of the Communications Act of 1934.

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CONCLUSION

The premises considered, Petitioners request that the Commission issue a declaratory ruling or rulings consistent with the facts and arguments presented.

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Dated: July 15, 1996